

§ 904.252

evidence may be taken to establish matters of aggravation or mitigation.

(e) Exhibits in a foreign language must be translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits, along with the name of the translator, must be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

(f) A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. The Judge, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party.

§ 904.252 Witnesses.

(a) Any witness not a party may have personal counsel to advise him or her as to his or her rights, but such counsel may not otherwise participate in the hearing.

(b) Witnesses who are not parties may be excluded from the hearing room prior to the taking of their testimony.

(c) Witnesses other than NOAA employees subpoenaed under these rules, including § 904.245, will be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken are entitled to the same fees as are paid for like services in the courts of the United States. Fees and any other related expenses for NOAA employees as authorized by the NOAA travel handbook will be paid by the party at whose instance the witness appears or the deposition is taken.

(d) If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent to which interpreters are to be used. When available, the interpreter must be court certified under 28 U.S.C. 1827.

§ 904.253 Interlocutory appeals.

(a) At the request of a party or on the Judge's own initiative, the Judge may certify to the Administrator for review

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a ruling that does not finally dispose of the proceeding, if the Judge determines that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(b) Upon certification by the Judge of the interlocutory ruling for review, the parties have 10 days to serve any briefs associated with the certification. The Administrator will promptly decide the matter.

(c) No interlocutory appeal lies as to any ruling not certified by the Judge.

§ 904.254 Ex parte communications.

(a) Except to the extent required for disposition of ex parte matters as authorized by law, after issuance of a NOVA, NOPS, or NIDP and until the final decision of the Agency is effective under these regulations, no ex parte communication relevant to the merits of the proceeding may be made, or knowingly caused to be made:

(1) By the Judge or by an Agency employee involved in the decisional process of the proceeding to any interested person outside the Department of Commerce or to any Agency employee involved in the investigation or prosecution of the case;

(2) By any Agency employee involved in the investigation or prosecution of the case to the Judge or to any Agency employee involved in the decisional process of the proceeding; or

(3) By an interested person outside the Department of Commerce to the Judge or to any Agency employee involved in the decisional process of the proceeding.

(b) An Agency employee or Judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the Judge or Administrator, as appropriate, may take action consistent with these rules, the applicable statute, and 5 U.S.C. 556(d) and 557(d).

(c) Agency counsel may not participate or advise in the decision of the Judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with this subpart. In addition, the Judge may not consult any person or party on a